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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-951

DONNA J. WOODSIDE, ADMX. OF THE ESTATE OF HENRY WILLIAM SCHROEDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, Donna J. Woodside, Administratrix of the estate of Henry William Schroeder, deceased, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on September 20, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was reported in 606 F. 2d 134 (6th Cir. 1979), and is printed in Apendix B hereto. The unreported opinion of the United States District Court for the Southern District of Ohio is also printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals go beyond the original scope and intention of the *Feres* doctrine so as to nullify its original objectives?

2. Does the decision, in its effect, amount to a denial of Due Process in violating the U.S. Constitution because it discriminates against servicemen's claims without a rational basis?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property without due process of law."

STATUTE INVOLVED

The statutory provisions involved are 28 U.S.C. Sections 1346 (b), 2674 and 2680, otherwise known as the Federal Tort Claims Act which are printed in Appendix A.

STATEMENT OF THE CASE

Plaintiff brought this action for the wrongful death of her husband under the Federal Tort Claims Act. Her husband, Henry Schroeder, was killed on April 19, 1973 in the crash of an aircraft near Wheeler Air Force Base, Hawaii. The facts are not in dispute and are set forth in the Opinion of the Court of Appeals. (Appendix B). The basic facts are as follows: The decedent was a Captain in the United States Air Force and a civil engineer, whose duties did not include those of a flight crewmember. Captain Schroeder's death occurred during the midst of a five-day leave from active duty. At the time of his death, he was taking flight instructions for personal recreation. The flight instructor was a civilian employee of an Aero Club, a nonappropriated fund activity of the Air Force. The aircraft, a civilian-type trainer, crashed due to the negligence of the instructor, killing both the instructor and Captain Schroeder.

Following the institution of the suit, the United States moved to dismiss on the grounds that plaintiff's action was barred because the decedent's death occurred "incident to service" as defined in *Feres* v. *United States*, 340 U.S. 135 (1950), which precludes recovery against the United States where a serviceman's injury occurs "incident to service."

Plaintiff responded that the *Feres* exception to liability under the Act was limited to situations where the claimant was subject to military discipline and military discipline might be affected by permitting the claim. The District Court held that Captain Schroeder was not subject to military discipline at the time of his death. Notwithstanding this finding, the District Court held that had Captain Schroeder not been a member of the Armed Forces, he would not have been able to avail himself of the Aero Club, therefore his death was "incident to service" and dismised the Complaint. (Appendix B).

The Court below affirmed the Judgment of the District Court, holding that the *Feres* "incident to service" exception extended ". . . beyond situations where the soldier is acting pursuant to orders or while subject to military discipline."

REASONS FOR GRANTING THE WRIT

In dismissing the complaint, the Court of Appeals for the Sixth Circuit incorrectly stated the law aplicable to claims by servicemen under the Federal Tort Claims Act. The Court below has added to the confusion stemming from the judicially imposed limitation to liability under the Act. The conflict in decisions among the Circuits evidences this confusion. The decision of the Courts below violates the plaintiff's constitutional guarantee of due process of law to the extent that it departs from this Court's rationale supporting the *Feres* doctrine.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING THE "INCIDENT TO SERVICE" TEST SET FORTH IN FERES.

The Federal Tort Claims Act waives the sovereign immunity of the federal government by providing that the United States shall be liable in the same manner and same extent as a private citizen. 28 U.S.C. Section 2674. The statute does not distinguish between civilian or military claimants.

This Court created a judicial exception to the Act in *Feres* v. *United States*, 340 U.S. 135 (1950), wherein the Court held:

> ". . . that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries are out of or are in the course of activity incident to service."

The Act itself contains no "incident to service" or like exception, pertaining to military claimants. Thirteen exceptions to liability are specified in the Act, 28 U.S.C. 2680,[1] none are applicable to the circumstances of the instant case. *Feres* consisted of three cases, each involved a claimant on active duty and not on furlough, who sustained injury due to the negligence of others in the Armed Forces.

The *Feres* case had been preceded by *Brooks* v. *United States*, 337 U.S. 49 (1949) which involved two Army men who, while on furlough, were injured in a collision with an Army truck negligently operated by a civilian employee of the Army. This Court held the government liable stating that the "any claim" clause of the Act meant all negligence claims including those brought by servicemen.

The third decision of this Court regarding servicemen's claims concerned a discharged serviceman who was negligently treated in a Veteran's Administration hospital. This Court held that an action was maintainable under the Tort Claims Act stating:

> The *Feres* decision did not disapprove of the *Brooks* case. It merely distinguished it . . . The peculiar and special relationship of the soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read the Act as excluding claims of that character. 384 U.S. at 111-112.

The *Brooks*, *Feres* and *Brown* decisions have unfortunately been the source of many inconsistent and confusing lower court decisions that attempt to define "incident to service." Many Courts have applied a mechanical "but for" test. The Fifth Circuit decided a claim for negligent treatment of a

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[1] 28 U.S.C. Section 2680 is printed in Appendix A, infra.

soldier injured on leave in *Schultz* v. *United States,* 421 F. 2d 170 (5th Cir. 1969), stating:

> "It is true that Schultz was injured while on leave and that the leave was never formally cancelled prior to his death. Nevertheless, it is obvious that the injured man could not have been admitted and would not have been admitted to the Naval Hospital *except for his military status.* He was treated there because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of treatment had to be 'in the course of activity incident to service'."

The Eighth Circuit employs a variation of the "but for" test. In *Chambers* v. *United States,* 357 F. 2d 224 (8th Cir. 1966), a serviceman's death was held "incident to service" when he drowned in the base swimming pool while on leave. The Court stated that the airman's use of the pool depended upon his military service. The Court significantly added that even though on leave at the time, the victim had been subject to military control of his superiors, i.e. the lifeguards and others, thus adding the factor of military discipline to the "but for" analysis.

The *Chambers* case conflicts with *Brown* v. *United States,* 99 F. Supp. 685 (S.D. W. Va. 1951). The Court permitted recovery for the death of a sailor who drowned while swimming in a base pool since, at the time of his death, the deceased was ". . . on leave or liberty and was not under military duty." *Chambers* and *Brown* presented near identical fact situations and oposite results were reached. The contradiction is due to the different definitions of "incident to service" used by the two Courts.

The Circuits continue to apply differing tests in determining liability under the *Feres* doctrine. The Ninth Circuit has attempted to define "incident to service" on at least three occasions. Each time the Court has been presented with differing fact patterns and employed three different definitions.

All of which, exhibit the need for this Court to grant certiorari and finally resolve the issue. In *Lee* v. *United States,* 400 F. 2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969), the claimant was killed when the military aircraft in which he was a passenger crashed, due to the negligence of a civilian employee of the government, specifically an air traffic controller employed by the Federal Aviation Administration. Plaintiff argued that his suit was maintainable under the Federal Tort Claims Act since the injury was not due to the negligence of another member of the Armed Services. In its response, the government argued that, since the air traffic controller worked at a Naval Air Station, he was under the command of the military and, therefore, there was a connection between the negligence and the military service. Without relying on this point, the Ninth Circuit denied recovery stating that, at the time of his death, the decedent was on active duty aboard a military aircraft and, therefore, his death was "incident to service."

The Ninth Circuit next decided *Henninger* v. *United States,* 473 F. 2d 814 (9th Cir. 1973), cert. denied, 414 U.S. 819 (1973). The Court held that the United States was not liable under the Tort Claims Act for the negligence of Navy physicians in performing a hernia operation. In its opinion, the Court held that ". . . Feres absolutely bars Federal Tort Claims actions by servicemen injured 'while on duty' and not on furlough . . . due to the negligence of others in the Armed Forces." 473 F. 2d at 816. This definition of "incident to service" includes as a factor the issue of whether or not the negligence was that of other persons in the Armed Forces, thus creating an apparent conflict with its earlier decision in *Lee* where the tortfeasor was not in the Armed Forces.

The definition employed by the Ninth Circuit in *Henninger* also included the factor of whether or not the claimant was on furlough at the time of his injury. This concept follows the language of this Court in both the *Feres* and *Brooks*

decisions which discussed whether or not the claimant was on a leave or furlough status from his duties. However, other courts, including the Ninth Circuit in *Mills* v. *Tucker,* 499 F. 2d 866 (9th Cir. 1974), have denied recovery where, at the time of injury or death, the serviceman was on leave status. In *Mills,* the Ninth Circuit held that whether or not a serviceman is off-duty or on leave is not always dispositive. After these three confusing cases, a statement by the Ninth Circuit in *Henninger* is certainly accurate and points to the need for this Court to re-examine the many cases that have been decided subsequent to *Feres*:

> "The precise rationale for the *Feres* rule and its continuing validity have been the source of some confusion." 473 F. 2d at 815.

The confusion regarding the *Feres* doctrine is highlighted and emphasized by an article in the Air Force Law Review. The author, though speaking for himself, obviously expressed service-wide concern over the inconsistent decisions which interpret the *Feres* doctrine. See 18 A.F.L. Rev. 24 (Spring 1976). In a twenty-one page article, he chronicles the military's frustration with the *Feres* doctrine tracing its history from 1950 to the date of the article. He concludes:

> "The doctrine should be limited to cases that occur within the scope of a member's normal duty assignments."

Some courts have held that the vital question is whether or not the serviceman was subject to military discipline at the time of his injury. In *Herreman* v. *United States,* 476 F. 2d 234 (7th Cir. 1973), a National Guardsman was killed in the crash of a military aircraft while traveling in a space available basis. In denying recovery, the Seventh Circuit emphasized that while aboard the aircraft the decedent was subject to military courtesies and discipline.

The Sixth Circuit has held the military discipline nexus dispositive. See *Knight* v. *United States,* 361 F. Supp. 708,

713 (W.D. Tenn. 1972), aff'd. mem., 480 F. 2d 927 (6th Cir. 1973) and *Hale* v. *United States,* 416 F. 2d 355, 358-59 (6th Cir. 1969). The rationale for these two cases followed the original rationale of *Feres* v. *United States,* in stating that military claims should be barred when to allow such claims would have an adverse effect on military discipline. However, in the instant case, the Sixth Circuit held that the *Feres* doctrine is not limited to situations where a serviceman is killed in the course of duty or while subject to a direct command relationship, thus going beyond the rationale of the *Feres* doctrine as originally set forth by this Court and recently reaffrmed in *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977).

The District Court held that Captain Schroeder was not subject to military discipline at the time of his death, a finding the Sixth Circuit did not question. Captain Schroeder was in the midst of a five day leave pursuing a recreational endeavor. He was not killed due to the negligence of a fellow soldier. Judge Hogan correctly determined that he was outside the scope of military discipline. The decisions of both the District Judge and the Sixth Circuit that the *Feres* doctrine extends to deny recovery directly conflict with other Circuits' decisions and are contrary to this Court's holdings in *Feres.* Such an expansion amounts applying a "but for" definition of "incident to service." The *Feres* case clearly does not preclude all military claims as such a test does. The Sixth Circuit's expansion of the limitation of liability and departure from the rationale of *Feres* should be reversed by this Court.

II. THE LIMITATION TO LIABILITY UNDER THE TORT CLAIMS ACT UNCONSTITUTIONALLY DISCRIMINATES AGAINST SERVICEMEN'S CLAIMS.

The petitioner submits that the "incident to service" test created by the *Feres* doctrine, as interpreted by the lower federal courts unconstitutionally discriminates against plaintiff in the instant case and other similarly situated military claimants. The denial of their claims in situations where a civilian claimant can recover under the Federal Tort Claims Act renders the military claimant a second class citizen. Such a result is especially inappropriate at a time when our government is seeking to fill the ranks of the military services with volunteers. Such a limitation on servicemen's rights is injurious to the national interest and should be remedied by this Court.

By denying military members a remedy under the Federal Tort Claims Act in situations where similarly situated civilians are permitted to sue the government, discriminates against military claimants as a class without a rational basis. Such discrimination constitutes a denial to the petitioner and others similarly situated of due process of law and the equal protection of the laws as guaranteed by the Fifth Amendment.

In enacting the Federal Tort Claims Act, Congress waived the sovereign immunity of the United States and granted a right to sue the government, which did not otherwise exist. Petitioner concedes that she has no constitutional right to sue her government. However, the Congress has, by the Tort Claims Act, granted that right. In doing so, the Congress must not discriminate unconstitutionally between classifications of potential claimants. The judicially created limitation to liability under the Act creates such an unconstitutionally discriminatiory classification in situations, like the instant one, where servicemen are denied recovery for tortious injury where no effect on military discipline can occur by virtue of allowing the claim.

A statutory classification must be reasonable, not arbitrary and must rest on some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly situated are treated alike. *Johnson* v. *Robison*, 415 U.S. 361 (1974). On the facts of the instant case, if the claimant had been a civilian employee of the government taking flight lessons from the Aero Club and had been a victim of exactly the same circumstances which took the life of Captain Schroeder, he could maintain an action against the government under the Federal Tort Claims Act. No reason exists for such discrimination. The rationale of *Feres* v. *United States*, supra, and the decisions of this Court decided thereafter[2] reaffirm the basis for denial of recovery as relating to the unique military relationship between the soldier and his superiors.

No constitutional discrimination is present as long as the decision of the Court rests on the rationale of *Feres* expounded by this Court. However, when the doctrine is extended, as in the instant case, to limit liability premised on a "but for" test, the serviceman is denied his right without a rational basis.

The Tort Claims Act provides for governmental liability in situations where a private citizen would be liable. 28 U.S.C., Section 2674. No corresponding private liability exists in situations where servicemen are injured in the line of duty and recovery is barred. However, when the military claimant, at the time of injury, is not subject to military discipline and participating in an activity in which private liability exists, no rational basis exists to deny the claim under *Feres*.

As the *Feres* doctrine is being interpreted by the Circuit Courts of Appeals, many examples of unconstitutional discrimination are feasible. If a member of the Armed Services

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[2] *United States* v. *Muniz*, 374 U.S. 150 (1963), and *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977).

is killed in the crash of a regularly scheduled commercial airflight due to the negligence of a governmental entity, such as the Federal Aviation Administration, the civilian passengers may seek redress against the government. An active duty military person, who perishes in such an accident, will be denied recovery, since his death occurred "incident to service" as currently defined by many of the Courts of Appeals. Such an obvious unfair and unjust result must be avoided.

It is time that this Court re-examine the *Feres* doctrine in light of the multitude of varying decisions of the lower courts. In *Stencel Aero Engineering* v. *United States,* 431 U.S. 666 (1977), Mr. Justice Marshall, in a dissenting opinion, with whom Mr. Justice Brennan joined, stated:

> "The opinion of the Court appears to be premised on the theory that in any case involving a member of the military on-duty, *Feres* v. *United States,* 340 U.S. 135 (1950), displaces the plain language of the Tort Claims Act. I cannot agree that the narrow judicially created exception to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the government by active duty servicemen based on injuries occured while on duty."

The petitioner submits that Mr. Justice Marshall is correct. The *Feres* doctrine, by its interpretation by the courts, has displaced the plain language of the Tort Claims Act. The narrow exception to sovereign immunity has been extended to the point that it raises questions of constitutional discrimination against military claimants. The *Feres* doctrine should be strictly limited to suits against the government by servicemen for injuries that occur, due solely to some duty related activity and not to injuries received merely because they were unfortunately a member of the Armed Forces. Absent such a connection with the military, no basis exists to discriminate against claims by servicemen and their dependents.

CONCLUSION

The Court of Appeals has misunderstood and misapplied the decision of this Court in *Feres* v. *United States.* The Sixth Circuit and other courts have gone beyond the language of the Federal Tort Claims Act to deny any serviceman on active duty the rights granted to him under the Federal Tort Claims Act, even where, as in this case, the tortious injury occurs at a time where the serviceman is not subject to military discipline and the activity is one not directly connected with his military service. Decisions of the various federal courts with respect to servicemen's rights under the Act, are inconsistent and confusing. A denial of cause of action under the Tort Claim Act, under these circumstances, discriminates against servicemen without rational basis.

The Court should grant this Petition for a Writ of Certiorari and reverse the holding of the Sixth Circuit Court of Appeals. To avoid confusion and resolve the inconsistency among the various lower federal courts, this Court should reaffirm and expand its decisions in *Brooks, Feres* and *Brown* to make it clear that the Federal Tort Claims Act is a statute of general applicability providing for the liability of the United States where there is a corresponding private liability, and that servicemen on active duty may recover under the Act, except in situations where there is a direct military command relationship and no corresponding private liability exists. For the foregoing reasons, petitioner respectfuly urges that this Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals should be granted.

Respectfully submitted,

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and
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APPENDIX A

Statute Involved

28 U.S.C. 1346(b):

> "Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
>
> * * * * *

28 U.S.C. 2674 provides in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."
>
> * * * * *

28 U.S.C. 2680:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049 § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

APPENDIX B

No. 77-3276

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNA J. WOODSIDE, Administratrix of the Estate of HENRY WILLIAM SCHROEDER,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 20, 1979.

Before: CELEBREZZE and LIVELY, Circuit Judges and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. Appellant Donna J. Woodside, administratrix of the estate of her husband, Captain Henry William Schroeder, appeals from the dismissal of her wrongful death action against the United States. Captain Schroeder, an active duty officer in the Air Force, was killed in an airplane crash while he was receiving flight instruction toward a commercial pilot's license. Appellant filed suit in the district court under the Federal Tort Claims Act (hereinafter the FTCA or the Act), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, seeking damages for the alleged negligence of the United States. The district court concluded that, at the time of his death, Captain Schroeder was engaged in an "activity incident

to [his military] service" within the meaning of *Feres* v. *United States*, 340 U.S. 135 (1950), which precludes suits against the United States under the FTCA by service members or their estates. Accordingly, the district court dismissed appellant's complaint for failing to state a claim cognizable under the Act.

We Affirm.

I

The facts are not in dispute. Schroeder, who held the rank of Captain in the Air Force at the time of his death, was a civil engineer by profession. He was attached to the 6003 Support Squadron (PACAF) stationed at Hickman Air Force Base, Hawaii.

Captain Schroeder was not a military pilot, nor did his military duties require that he have a pilot's license or fly as a member of a flight crew. However, Captain Schroeder did hold a private pilot's license, which he obtained in 1972. Captain Schroeder's interest in aviation was purely personal. He obtained his license for reasons wholly unrelated to his duties in the Air Force.

Captain Schroeder was a member of the Hickman-Wheeler Air Force Base Aero Club (the Club), a non-appropriated fund instrumentality of the United States Air Force.[1] The Club, located on Wheeler Air Force Base, was established and operates as an instrumentality of the United States under the auspices of the Air Force, pursuant to 32 C.F.R. §§ 984 *et seq.*[2]

Aero clubs are established "as recreational activities to promote morale" and are intended to provide their members

[1] A non-appropriated fund instrumentality is one that is not funded by Congressional appropriation. *See United States* v. *Hopkins*, 427 U.S. 123, 125 n. 2 (1976); Johnson v. United States, 600 F.2d 1218 (6th Cir. 1979).

[2] At the time the parties filed their briefs int his case, the Air Force aero club regulations were published at 32 C.F.R. §§ 861 et seq.

with the opportunity to learn aviation skills under safe, low-cost conditions. 32 C.F.R. § 984.1(a). Moreover, the Hickman-Wheeler Aero Club By-Laws provide that "[t]he purpose of the Club is to stimulate an interest in aviation; to provide . . . opportunities to engage in flying as a recreational activity; and to encourage and develop skills in aeronautics . . . ."

Membership in an aero club is limited to two basic categories of individuals. 32 C.F.R. § 984.8. Only active duty military personnel of the United States Armed Forces are eligible for "active membership." 32 C.F.R. § 984.8(a). "Associate" membership is available to a wide range of military-related personnel (including families of active duty service members, civilian Department of Defense employees and their families, and members of Congress) not pertinent to this appeal. 32 C.F.R. § 984.8(b).[3] Captain Schroeder was an "active member" of the Club by virtue of the fact he was an active duty member of the Air Force.

The Club operates a Federal Aviation Administration (FAA) approved (Certificate PC-02-15) flight school. The school prepares students for the various civilian pilot's licenses issued by the FAA. The Club employs FAA certified civilian flight instructors and charges members for flight instruction. At the time of the accident involved in this case, the Club owned a Cessna 150 (License No. N1216Q) two-seat trainer aircraft, which was used to conduct in-flight training.

On April 16, 1973, Captain Schroeder went on a five day leave from the Air Force. Schroeder's "leave" was equivalent to civilian vacation time, and could be withdrawn only for a "military necessity." A.F.M. 177-373, vol. III (C)(2), para. 1-1-c (1 Oct. 1976). Captain Schroeder was not scheduled to return to duty until April 21, 1973.

On April 19, 1973, at approximately 9:05 local time, Cap-

[3] A third category, introductory membership, may be temporarily extended to an individual otherwise eligible for active or associate membership. 32 C.F.R. § 984.8(c).

tain Schroeder and Gordon Hanna, a certified civilian flight instructor employed by the Club, departed from Wheeler Air Force Base in the Club's Cessna 150 for the purpose of flight instruction. Captain Schroeder had paid the Club for the instruction and was working toward a "commercial" pilot's license. During the course of the flight the aircraft crashed, fatally injuring both Schroeder and Hanna. The crash occurred on Oahu island, Hawaii, approximately five miles south of Wheeler Air Force Base.

II

After having exhausted her administrative remedies, appellant filed suit in the district court against the United States for the wrongful death of her husband, pursuant to the FTCA, 28 U.S.C. §§ 1346(b)[4] and 2674.[5] In substance, appellant alleged in her complaint that the cause of the accident that killed Captain Schroeder was the negligence, carelessness, and

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[4] Section 1346(b) provides, in pertinent part:

> [T]he United States District Court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[5] Section 2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

recklessness of Gordon Hanna, an employee of the United States, while acting as the pilot-in-command and flight instructor.

In response, the United States moved to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), on the ground that *Feres* v. *United States*, 340 U.S. 135 (1950), precluded suit by a member of the Armed Forces against the United States. The government argued that Captain Schroeder was killed "in the course of activity incident to [military] service" within the meaning of *Feres* and was thus barred from suing under the FTCA.

Initially, the district court denied the motion to dismiss. Subsequently a hearing was ordered limited to the question of whether the facts of the present case supported application of the *Feres* doctrine. At that hearing, appellant testified that her husband's flying was not connected with his military duties, that his interest in aviation was recreational, and that she was receiving military compensation benefits as the result of Captain Schroeder's death. Captain Mark S. Anderson of the Judge Advocate General's office testified that, in his opinion, Captain Schroeder was subject to military control while on leave and was killed while engaging in an activity incident to service. Captain Anderson also testified that appellant was receiving military compensation benefits as the result of Captain Schroeder's death.

Following the hearing, the district court reconsidered its initial ruling and dismissed the action. Although holding that Captain Schroeder was not "subject to military discipline" at the time of his death, the district court nevertheless concluded that his activity was incident to his military service within the meaning of *Feres*. The court reached this conclusion on the basis of three factors: (1) that off-duty recreational activities provided by the Armed Forces or provided through a non-funded instrumentality of the Armed Forces are incident to military service; (2) that Captain Schroeder's flight originated and would have ended at the on-base aero club; and (3) although not dispositive, the government regu-

lations required covenants not to sue to be executed by associate (but not active) club members, indicating an expectation that *Feres* would apply to active club members. This appeal followed.

III

The FTCA provides that the United States shall be liable for "injury or . . . death caused by the negligent or wrongful act or omission of any employee of the government . . . under circumstances where the United States, if a private person, would be liable to the claimant . . . ." 28 U.S.C. § 1346(b). The Act "waives the Government's immunity from suit in sweeping language." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951). However, this broad waiver of immunity is not without its exceptions. *See generally*, Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 Geo. L.J. 1 (1946). The Act itself excludes certain types of government action from judicial review. 28 U.S.C. § 2680. Moreover, the Supreme Court has recognized that because Congress did not waive completely all government immunity, "it [the FTCA] does not say that all claims must be allowed." *Feres* v. *United States*, 340 U.S. 135, 141 (1950). It therefore remains for the courts to determine whether any particular claim is cognizable under the Act. *Id.*

In *Feres*, the Supreme Court recognized an exception to the government's tort liability where military service members sue the United States for service-connected injuries. Known as the "*Feres* doctrine," this exception provides that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen *where the injuries arise out of or are in the course of activity incident to service.*" (Emphasis added). *Id.* at 146. In *Feres*, the executrix of the estate of a serviceman who was killed in a barracks fire attempted to recover damages from the United States on the theory that the military had negligently quartered the decedent in a

dangerous facility.[6] A unanimous Court held that the FTCA did not apply to service members who sustain injuries "incident [to their military] service" despite the fact that those injuries may have been negligently inflicted.

The Supreme Court relied upon several factors in finding an exception to the FTCA, including: (1) the "distinctly federal" relationship between the United States and members of the Armed Forces, requiring that federal law, and not state law, determine the liability of the government; (2) the fact that no private liability parallel to that asserted by the service members existed at common law; and (3) the existence of a "simple, certain and uniform" system of compensation in the Veterans' Benefit Act, which provides generous benefits without regard to fault. *Id.* at 141-44.

An adidtional factor weighing against permitting service member suits under the Act, mentioned in *Feres*, was discussed in *United States* v. *Brown*, 348 U.S. 110, 112 (1954). The Court stated that "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty" served as strong reasons supporting the continued immunity of the United States from such suits.

Appellant contends that in the years subsequent to *Feres*

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[6] Decided along with *Feres* were Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950) involving a wrongful death action based upon the alleged medical malpractice of Army surgeons, and Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950), also involving malpractice by an Army surgeon who allegedly left a towel, 30 inches long by 18 inches wide, in the stomach of the plaintiff.

Because of a conflict in the circuits over whether these service members could bring suit against the United States under the FTCA, the Supreme Court agreed to review the trilogy of cases to resolve the issue. Griggs, *cert. granted*, 339 U.S. 951 (1950); Feres, *cert. granted*, 339 U.S. 910 (1950); Jefferson, *cert. granted*, 339 U.S. 910 (1950).

the Supreme Court has gradually narrowed the factors it relied upon in that decision in barring service member suits under the Act.[7] Appellant points out that the Supreme Court allowed the serviceman in *Brown* to sue under the FTCA even though he had previously received military compensation for his injuries. Appellant further points out that the Court, in *United States* v. *Muniz*, 374 U.S. 150 (1963), permitted federal prisoner suits under the Act by distinguishing *Feres*, commenting that "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, . . . and the extreme results that might obtain if suits . . . were allowed for negligent orders given or negligent acts committed." *Id.* at 162. Appellant argues, therefore, that *Feres* is limited to those situations where the disciplinary relationship between the soldier and his superiors is involved.[8]

Appellant seeks to limit the "incident to service" exception to the government's tort liability to those instances where the service member is injured "in the course of military duty," *Hale* v. *United States*, 416 F.2d 355, 358-59 (6th Cir. 1969) (*Hale I*), or "while subject to military discipline," *Knight* v. *United States*, 361 F. Supp. 708, 713 (W.D. Tenn. 1972), *aff'd mem.*, 480 F.2d 927 (6th Cir. 1973).[9] However, this

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[7] *See also* Note, *The Supreme Court and the Tort Claims Act: End of an enlightened Era?*, CLEV. ST. L.J. 267 (1978); Jacoby, *The Feres Doctrine*, 24 HASTINGS L.J. 1281 (1973).

[8] *See also* Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) where the Court permitted suit under the Act even though that case involved "novel and unprecedented governmental liability" without counterpart at common law. *See generally* Jacoby, 24 HASTINGS L.J. at 1287, "[i]t is now generally recognized that *Feres* is a well-established but limited doctrine excluding from coverage under the Torts Claim Act military plaintiffs, broadly subject to military discipline who seek recovery for wrongs sustained 'incident to service.'"

[9] Some courts have expressed the view that the Supreme Court has permitted a narrowing of the "incident to service" exception of *Feres* to situations where the service member is "performing duties of such a character as to undermine the traditional concepts of military discipline," Downes v. United States, 249 F. Supp. 626, 628 (E.D.N.C. 1965), or is engaging in an activity that "involved an official military relationship between the negligent person and the claimant," Lee v. United States, 261 F. Supp. 252, 256 (C.D. Cal. 1966), *rev'd* 400 F.2d 558, 562-64 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969), or "has suffered what might be called a work related injury," Bradshaw v. United States, 443 F.2d 759, 762-63 (D.C. Cir. 1971).

It should be noted that these cases were all decided before the recent Supreme Court opinion in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), and their continued validity is doubtful in light of the holding in *Stencel*.

court has never "attempt[ed] to effect a dramatic reinterpretation of the *Feres* doctrine," 361 F. Supp. at 713. *Hale I* and *Knight* are consistent with the decision in *Feres*.

Moreover, the Supreme Court unequivocally reaffirmed *Feres* and expanded the scope of the doctrine in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). In *Stencel* the Court relied almost exclusively upon *Feres*, together with its supporting rationale, to extend governmental immunity from suit to include third parties seeking indemnity from the United States. *See generally* Note, *Stencel Aero Engineering Corp.* v. *United States: An Expansion of the Feres Doctrine to Include Military Conrtactors, Subcontractors and Suppliers*, 29 Hastings L.J. 1217 (1978).

The plaintiff in *Stencel*, a Captain in the Missouri National Guard, was injured when the life-support system of his F-100 fighter aircraft malfunctioned. He subsequently brought suit under the FTCA against the United States and Stencel Aero Engineering, the manufacturer of the system, alleging negligence and carelessness. Stencel Aero, in turn, brought suit against the United States for indemnity, charging that any malfunction in the life-support system was due to faulty specifications and components provided by the government.

The Court held that a third-party indemnity action against the United States was barred "for essentially the same reasons that [a] direct action by [a service member] is barred by *Feres*." *Id.* at 673. The Court found that of the several factors it had considered in deciding *Feres*, three were particularly

relevant to Stencel's claim for indemnity: the distinctly federal nature of a suit against the United States by a soldier, the upper limit of compensation provided in the Veterans' Benefit Act, and the effect of service member suits on military discipline. *Id.* at 671-73. *See generally* Note, 29 Hastings L.J. at 1219-33.

The Ninth Circuit, relying upon *Stencel,* further expanded the *Feres* doctrine to bar suit by the estate of a foreign serviceman against the United States under the FTCA. In *Daberkow* v. *United States,* 581 F.2d 785 (9th Cir. 1978), a German serviceman had been killed while receiving flight training from an Air Force instructor, pursuant to a joint United States-Federal Republic of Germany military agreement. The court concluded that the rationale of *Feres* applied with equal force to foreign servicemen injured on American soil while engaging in joint military operations. *Id.* at 788-89.

Accordingly, we reject appellant's contention that the *Feres* doctrine is limited to those situations where a service member is injured or killed in the course of military duty or while subject to a direct command relationship with the Armed Forces.

IV

A service member may not sue the government for injuries "incident to service." *Feres,* 340 U.S. at 146. The Supreme Court has never specifically defined what constitutes activity incident to service. In a trilogy of cases beginning with *Brooks* v. *United States,* 337 U.S. 49 (1949), the Court has dealt with this phrase. In *Brooks,* two brothers, both active duty service members, were injured in an automobile accident. The brothers had been on military leave and were riding on a public highway when they were struck by a government vehicle. The brothers brought suit against the United States seeking damages for the negligence of the driver of the government vehicle. The Court allowed the suit concluding that the injuries sustained by the brothers were not incident

to their military service. The Court reasoned that the accident "had nothing to do with Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." *Id.* at 52.

In *Feres,* the Court disallowed three suits against the United States under the following circumstances: death of an active duty soldier in a barracks fire allegedly due to negligence of military personnel; death of an active duty soldier allegedly due to malpractice of Army surgeons; and injury to an active duty soldier resulting from a foreign object left in his abdomen during surgery by a military doctor.

Finally, in *Brown* the Court held that a veteran could sue under the Act for alleged negligence in treatment received at a Veteran's Hospital, resulting in permanent nerve damage to the veteran's leg. Brown, an honorably discharged serviceman, had been admitted to a government hospital for treatment of complications resulting from an incident-to-service injury. However, the Court concluded that the veteran could sue for injuries sustained in the Veteran's hospital because they were not incident to his military service.

The *Brooks-Feres-Brown* line of cases illustrates that the incident to service test is not easy to define and apply. What is clear from these cases, however, is that "incident to service" is not a narrow term restricted to military training, field maneuvers, or combat situations. Contrary to the contentions of appellant, the *Feres* doctrine extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline. *See generally* Rhodes, *The Feres Doctrine After Twenty-Five Years,* 18 A.F.L. Rev. 24 (Spring 1976). Thus, it has been held that a service member is engaged in an activity incident to service while swimming in an on-base swimming pool, *Chambers* v. *United States,* 357 F.2d 224, 229 (8th Cir. 1966); *Knight,* 361 F. Supp. at 713; riding a horse rented from a military riding stable, *Hass* v. *United States,* 518 F.2d 1138, 1141-42 (4th Cir. 1975); riding a bus to a military-sponsored beach party,

Degentesh v. *United States*, 230 F. Supp. 763 (N.D. Ill. 1964); and playing in a "donkey soft-ball game," *Keisel* v. *Buckeye Donkey Ball, Inc.*, 311 F. Supp. 370 (E.D. Va. 1970).

The government contends that *Feres* applies to any service member who, at the time of injury or death, was generally subject to Article II of the Uniform Code of Military Justice (UCMJ). We think this reading of the incident to service test extends the *Feres* doctrine too far. Although a wide range of activities have been held to be incident to service, Rhodes, 18 A.F.L. Rev. at 33-40, the *Feres* doctrine is not applied blindly. *Schwager* v. *United States*, 279 F. Supp. 262, 263 (E.D. Pa. 1968). In each case the result depends on the "relevant links" between the Armed Forces and the service member's activity, requiring "a measuring of the degree to which the activity is divorced from or related to military service." *Id.; Camassar* v. *United States*, 400 F. Supp. 894, 897 (D. Conn. 1975), *aff'd*, 531 F.2d 1149 (2d Cir. 1976).

Whether a service member is engaged in an activity incident to service is a question of fact, *Hass*, 518 F.2d at 1141, to be determined from the circumstances of each case. It is not enough that injury or death be service-connected in that military service precede the injury-producing activity only in the sense that "all human events depend upon what has already transpired." *Brooks*, 337 U.S. at 52. Rather, *Feres* requires that there be some proximate relationship between the service member's activity and the Armed Forces. Where the two are closely associated or naturally related, the activity will be deemed "incident to service" even though not an essential or integral part of the mission of the Armed Forces and even though not directly involving a command relationship between the soldier and the military. *See, e.g., Harten* v. *Coons*, 502 F.2d 1363 (10th Cir. 1974); *Henninger* v. *United States*, 473 F.2d 814 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973).

Conversely, where the soldier demonstrates that the activity has no significant link to the Armed Forces and is remote to his military service, suit under the Act has been allowed.

See, e.g., Brown, supra; *Brooks, supra*; *Mills* v. *Tucker*, 499 F. 2d 866, 868 (9th Cir. 1974).

Courts look to a number of factors in determining whether a particular activity is incident to service. When a service member is injured "in the line of duty," *Hale I*, 416 F.2d at 359, or "while engaged in the performance of an assigned military duty," *Camassar*, 531 F.2d at 1151, such has uniformly been held to be activity incident to service, irrespective of where it is performed.

Where a service member is subject to military discipline at the time of injury, *Feres* applies and suit is barred. *Alexander* v. *United States*, 500 F.2d 1, 5 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975); *Herreman* v. *United States*, 476 F.2d 234, 237 (7th Cir. 1973); *Hale* v. *United States*, 452 F.2d 668, 669 (6th Cir. 1971) (*Hale II*). A service member is subject to military discipline where his movements or actions are under the immediate control of military authorities. *Hale II, supra.*

As a general rule, an injury to an active duty service member on a military base, *Camassar*, 531 F.2d at 1151; *Chambers*, 357 F.2d at 229; *Knight*, 361 F. Supp. at 709, or while aboard military craft, *Uptegrove* v. *United States* — F.2d — No. 77-1723 (9th Cir. May 21, 1979); *Stansberry* v. *Middendorf*, 567 F.2d 617, 618 (4th Cir. 1978); *Herrman*, 476 F.2d at 237, or while receiving treatment at a military hospital or medical facility, *Harten*, 502 F.2d at 1364; *Peluso* v. *United States*, 474 F.2d 605, 606 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973); *Shults* v. *United States*, 421 F.2d 170, 172 (5th Cir. 1969), is deemed to be incident to military service. *Contra, Bryson* v. *United States*, 463 F. Supp. 908, 913-14 (E.D. Pa. 1978).

Whether the service member is an active duty member of the Armed Forces is another factor considered in determining whether an injury is service-related. Where the plaintiff is a veteran, *Brown*, 348 U.S. at 110, or was discharged at the time of the injury, *Bankston* v. *United States*, 480 F.2d 495, 497

(5th Cir. 1973), courts are less likely to find sufficient proximity between the injury-producing activity and the military. *See also Henninger,* 473 F.2d at 816; *Lee,* 400 F.2d at 562. The duty status (off-duty, on-leave, on-furlough) of the service member, while not dispositive, is also taken into account in determining the relationship of an activity to the Armed Forces. *Brooks, supra*; *Henninger, supra.*

Finally, where an activity is provided directly by the military or where there is substantial involvement by the Armed Forces in the activity, such will be deemed incident to military service even though not essential to the mission of the military. *Hass,* 518 F.2d at 1141; *Chambers,* 357 F.2d at 229; *Keisel,* 311 F. Supp. at 370. *See generally* Rhodes, 18 A.F.L. Rev. at 36-40.

Viewing the present case in light of the foregoing factors, we agree with the district court that Captain Schroeder was killed while engaging in an activity incident to his military service within the meaning of *Feres.* At his death, Captain Schroeder was an active duty officer in the Air Force. By virtue of his service in the military, Captain Schroeder was able to gain membership in the Hickman-Wheeler Aero Club. The Club is a non-appropriated fund activity of the Air Force, established to promote the morale of service members. 32 C.F.R. § 984.1. The base commander has overall responsibility to supervise the activities of the Club. 32 C.F.R. § 984.2. The Club must have a Board of Governors which has a voting majority of active duty military personnel. 32 C.F.R. § 984.3. Moreover, the Board must keep minutes and submit them through the chief of special services to the base commander for approval. *Id.*

Although not supported by direct congressional appropriation, the Club's activities are supported indirectly by the Air Force in that the Club uses facilities at Wheeler Air Force Base and purchases its fuel through the Air Force. The Club is required, by Air Force regulation, to maintain certain records, 32 C.F.R. § 984.14, impose pilot maneuver restrictions, 32 C.F.R. § 984.17, require minimum flight times to maintain currency, 32 C.F.R. § 984.20, and follow a definite and standardized training program, 32 C.F.R. § 984.21. We find this relationship between the Club and the Air Force to be direct and substantial, even though the Club is not an essential or integral part of the military mission of the Air Force.

We recognize that at the time of his death Captain Schroeder was on leave and that he was not subject to military discipline in the sense that his movements were subject to the immediate control of military authorities. Even in the absence of these factors, we find the link between the Air Force and the Club sufficient to bring Captain Schroeder's flight instructions within the realm of activities incident to his military service. Accordingly, we conclude that the district court was correct in dismissing this action as failing to state a claim cognizable under the FTCA.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-75-447

DONNA J. WOODSIDE, Adm'x of the
Estate of WILLIAM SCHROEDER,
Plaintiff,

vs.

UNITED STATES OF AMERICA

and

UNITED STATES AIR FORCE,
Defendants.

ORDER OF DISMISSAL

(Filed February 28, 1977)

This action is brought by the widow of a deceased air force officer on behalf of his estate under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*. The defendant United States has petitioned for a reconsideration of the Court's Memorandum Opinion on Motion to Dismiss (filed May 7, 1976, doc. no. 8).

A review of the relevant facts should precede any reconsideration. The following facts are either not in dispute (Stipulation of Fact, doc. 8) or are taken as true from the pleadings for purposes of the Rule 12 motion:

1. At the time of the accident, Captain Schroeder, husband of the plaintiff, was on a five day leave[1] from the Air Force.

[1] "Leave" and "furlough" are used interchangeably in the context of this discussion, notwithstanding any technical differences.

He was stationed at Hickam-Wheeler Air Force Base in Hawaii.

2. Captain Schroeder was not a pilot for the Air Force, and his duties while on duty did not require him to be qualified or licensed to fly any plane.

3. The aircraft which crashed, killing Captain Schroeder, was owned by the Hickam-Wheeler Air Force Base Aero Club (Aero Club) and had a civilian registration with the F.A.A.

4. The Aero Club is established and operates as an instrumentality of the federal government under the auspices of the United States Air Force pursuant to 34 C.F.R. § 860 *et seq*.

5. The Aero Club operates a flight school under a civilian certificate issued by the F.A.A., and prepares student members for civilian pilot certificates. The Club does not train or instruct students to fly military aircraft.

6. Captain Schroeder's pilot-instructor on his fatal crash was Gordon G. Hanna. Hanna was a civilian employee of the Aero Club and the United States and was acting as such at the time of the accident.

7. Aero Club membership is open to active duty military personnel, as well as other persons connected with military life, 32 C.F.R. § 861.8.

8. Each Aero Club member not an active-duty member of one of the Armed Forces branches must execute a waiver not to sue for loss of life, injury or property damage before being allowed to operate Aero Club aircraft or fly as a passenger, 32 C.F.R. § 861.13.

9. "Leave" is a vacation equivalent for servicemen which is intended to get them away from their military duties. Leave may be withdrawn only for military necessity, AFM 177-373 Vol. III (C2) 1-1-c (1 October 1976).

10. Active-duty military personnel are subject to the Uniform Code of Military Discipline while on leave.

I. "SUBJECT TO MILITARY DISCIPLINE"

In its previous Memorandum this Court found that the deceased was not injured in the course of "activity incident to service," *Feres* v. *United States,* 340 U.S. 135, 146 (1950) and could therefore advance a claim under the Federal Tort Claims Act. The Sixth Circuit has interpreted the *Feres* doctrine to include any serviceman "subject to military discipline," *Hale* v. *United States,* 416 F.2d 355 (6th Cir. 1969) and 452 F.2d 668 (6th Cir. 1971). A District Court in this Circuit was subsequently upheld by the Sixth Circuit when it held that a soldier who was on active duty assignment but at liberty, and who drowned at an on-base pool supervised by Navy lifeguards, was "subject to military discipline," *Knight* v. *United States,* 361 F.Supp. 714 (W.D. Tenn. 1972), *aff'd* 480 F.2d 927 (6th Cir. 1973).

The facts of this case are distinguishable for several reasons from the *Knight* case. First, the Aero Club has no Air Force supervisory personnel analogous to military lifeguard to whom an off-duty Aero Club member must answer. The manager and the flight instructors are civilian employees with built-in independence under the enabling regulations, 32 C.F.R. §§ 861.5, 861.6. Second, the plaintiff here is on leave, not merely off-duty. Leave is a vacation entitlement of a serviceman, the denial of which is subject only to military necessity, AFM 177-373, Vol. III (C2) 1-1-c (1 October 1976). While this Court agrees with the government that servicemen on leave are subject to the Uniform Code of Military Justice, to other military regulations and to "discipline," it cannot accept the premise that a serviceman on leave is "subject to military discipline" within the meaning intended by the Court in *Hale.* The discussion in *Hale* specifically differentiates the duty status of the claimant, 416 F.2d at 360. To restate the

analysis, the Sixth Circuit appears to find that an on-leave, off-base serviceman is at least clothed with a type of rebuttable presumption that he is not "subject to military discipline," within the *Feres* doctrine, and therefore eligible to bring a claim under the Tort Claims Act. In *Hale,* the plaintiff came back within the scope of discipline when he entered the car driven by the M.P.'s, 452 F.2d at 669.

To conclude, there are simply no facts which suggest that the deceased was "subject to military discipline" at the time of his death in the sense intended by the Sixth Circuit in *Hale,* and to that extent this Court's Memorandum of May 7, 1976 is not disturbed.

II. "INCIDENT TO MILITARY SERVICE"

The *Hale* and *Knight* glosses on the *Feres* doctrine does not, in the view of this Court, cover all possible circumstances in which a member of the Armed Forces may or may not sue under the Federal Tort Claims Act. More specifically, whether an active-duty officer is "subject to military discipline" does not end every inquiry into the propriety of maintaining a suit under the Tort Claims Act. The *Feres* doctrine, precludes recovery under the act when the injuries arise out of or are in the course of activity incident to military service, 340 U.S. at 146. That general guideline need not, and has not been turned into a rigid test of duty status, *Mills* v. *Tucker,* 499 F.2d 866, 868 (9th Cir. 1974). Military personnel – including Reserve servicemen – on furlough have been barred from recovery, *Herreman* v. *United States,* 476 F.2d 234 (7th Cir. 1973), *Archer* v. *United States,* 217 F.2d 548 (9th Cir. 1954), *cert. denied* 348 U.S. 953 (1955).

The facts of this case are unique to the extent that the defendant was on furlough, was off-base at the time of the accident, but had originated the fatal activity on base. Further, the only way Captain Schroeder could have qualified

for Aero Club membership was by virtue of his military service.[2]

A case similar to the instant action involved an off-duty Marine injured while riding on a horse rented through a stable owned and operated by the Marine Corps. In *Hass* v. *United States*, 518 F.2d 1138 (4th Cir. 1975) the Court held that an active-duty serviceman, temporarily in off-duty status and engaged in recreational activity on a military base could not sue under the Tort Claims Act, *Id.* at 1142. That premise is generally adopted and expanded in this case.

First, off-duty recreational activity provided directly by a Service or by non-funded activities, – such as officers' clubs, *Richardson* v. *United States*, 266 F.Supp. 49 (E.D. Va. 1964); swimming pools, *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966), *Knight* v. *United States, supra*; and riding stables, *Hass* v. *United States, supra*, – should be and have been considered activity incident to military service and therefore exempt from tort claims under the *Feres* doctrine. Those cases are based, to a great extent, on the status of the activity, and not the status of the injured party.

Secondly, the fact that the plaintiff's deceased was injured "off base" must be considered in context. This is not an "off base" accident in the general sense. The flight originated – and would have ended – at the on-base Aero Club. The inherent nature of flying would preclude many flights which originate at an Aero Club from being considered "on base." Yet a delineation between an on-base accident (such as take-off or landing accidents) and off-base crashes would be not

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[2] The Aero Club is a non-funded governmental instrumentality which must support itself. To the extent – if any – that it derives indirect benefits from its association with Hickam-Wheeler Air Base that fact alone is not dispositive of the question of whether activity clearly non-military in nature performed while on leave is "incident to military service," *Hass* v. *United States*, 518 F.2d 1138, 1141 n. 2 (4th Cir. 1975).

only arbitrary, but also one premised upon a distinction without a relevant basis. Therefore the instant crash is considered to have originated with an on-base recreational facility.

Third, the Court considers the expectations of the Aero Club and the government regulations on insurance and damage claims. Aero Clubs do not – and may not – carry insurance. All claims are adjusted on the basis of 32 C.F.R. § 842.40 *et seq.*, as required by 32 C.F.R. § 861.30. All Aero Club members, excepting active-duty servicemen, must execute a covenant not to sue before being allowed on an Aero Club plane as a pilot or passenger, 32 C.F.R. § 861.13. The clear expectation is that military personnel need not execute such waivers. First, they and their dependents are covered under military benefits programs. Secondly, they are precluded from negligence suits under the Federal Tort Claims Act by the *Feres* doctrine. While that expectation is certainly not a basis for the exclusion of any particular plaintiff otherwise eligible to sue under the Act, it does help explain the regulatory scheme and shed some light upon the issue of whether the plaintiff's deceased was killed in activity incident to military service.

After considering the status of the plaintiff's deceased and the nature of the activity in which he was involved, the Court concludes that an active-duty serviceman killed while training in an Aero Club plane under the direction of a civilian employee of such a club is involved in activity incident to military service within the meaning of the *Feres* doctrine. Such a serviceman may not maintain a suit under the Tort Claims Act.

CONCLUSION

While the plaintiff's deceased, an active-duty officer on leave, was not subject to military discipline within the meaning of that term as applied to the *Feres* doctrine, he was, nonethless, involved in an activity incident to military service. The plaintiff may not maintain a suit on behalf of the deceased officer's estate, and this action must be dismissed.

IT IS SO ORDERED.

/s/ TIMOTHY S. HOGAN
United States District Judge

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-951

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONNA J. WOODSIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, petitioner contends that the district court and the court of appeals erroneously held that the injury to the decedent occurred in the course of "activity incident to [military] service" within the meaning of *Feres* v. *United States*, 340 U.S. 135, 146 (1950).

On April 19, 1973, Air Force Captain Henry Schroeder, petitioner's husband, was killed while tak-

ing flight instruction for a civilian pilot's license from a civilian employee of the Hickman-Wheeler Air Force Base Aero Club, a flight club sponsored by the Air Force (Pet. App. 18a-19a).[1] Schroeder was on leave at the time of the crash (*id.* at 18a). The district court dismissed petitioner's FTCA suit on the ground that "an active-duty serviceman killed while training in an Aero Club plane under the direction of a civilian employee of such a club is involved in activity incident to military service within the meaning of the *Feres* doctrine" (*id.* at 23a).[2] The court of appeals affirmed in a thorough opinion on which we substantially rely (*id.* at 3a-17a).

Petitioner contends that there is a conflict among the circuits concerning the meaning of the phrase "incident to service." Significantly, however, every appellate decision cited by petitioner denied FTCA recovery (Pet. 5-9). Although it is true that different factors were considered in these cases in determining that the activity was incident to military service, the differences reflect only the varying circumstances of the accidents. Petitioner points to no conflicting deci-

[1] The Aero Club is a non-appropriated fund instrumentality of the United States, operated under the auspices of the Air Force (Pet. App. 4a & n.1). See 32 C.F.R. 984 *et seq.* Schroeder was an "active member" of the Club, a status available only to active duty personnel of the United States Air Force (see Pet. App. 5a). Schroeder was taking flight instruction for personal reasons and not as part of his military duties (*id.* at 18a-19a).

[2] The *Feres* rule was recently reaffirmed in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977).

sions among the courts of appeals on similar facts.[3] Nor does petitioner cite any decision of a court of appeals allowing recovery under circumstances similar to the present case.

The decision below is correct. As the court of appeals noted (Pet. App. 16a), the lower courts have consistently held that where the military provides the opportunity for or is substantially involved in an activity engaged in by a soldier on leave, the activity will be considered "incident to military service" even if it is not essential to the mission of the service. See *Hass* v. *United States*, 518 F.2d 1138, 1141-1142 (4th Cir. 1975); *Chambers* v. *United States*, 357 F.2d 224, 229 (8th Cir. 1966); *Keisel* v. *Buckeye Donkey Ball, Inc.*, 311 F. Supp. 370 (E.D. Va. 1970). Here, the two lower courts correctly found that the Air Force was substantially involved in the Aero Club activity.[4]

[3] The only conflicting decisions cited by petitioner stem from *Brown* v. *United States*, 99 F. Supp. 685 (S.D. W.Va. 1951), which is of dubious authority in light of subsequent decisions of the courts of appeals, especially *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966). The factual circumstances in those two cases are dissimilar from those presented here.

[4] As the court of appeals stated (Pet. App. 16a-17a):

> By virtue of his service in the military, Captain Schroeder was able to gain membership in the Hickman-Wheeler Aero Club. The Club is a non-appropriated fund activity of the Air Force, established to promote the morale of service members. 32 C.F.R. § 984.1. The base commander has overall responsibility to supervise the activities of the Club. 32 C.F.R. § 984.2. The Club must have a Board of Governors which has a voting majority of active duty military personnel. 32 C.F.R. § 984.3. Moreover, the Board must keep minutes and submit them through the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

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chief of special services to the base commander for approval. *Id.*

Although not supported by direct congressional appropriation, the Club's activities are supported indirectly by the Air Force in that the Club uses facilities at Wheeler Air Force Base and purchases its fuel through the Air Force. The Club is required, by Air Force regulation, to maintain certain records, 32 C.F.R. § 984.14, impose pilot maneuver restrictions, 32 C.F.R. § 984.17, require minimum flight times to maintain currency, 32 C.F.R. § 984.20, and follow a definite and standardized training program, 32 C.F.R. § 984.21. We find this relationship between the Club and the Air Force to be direct and substantial, even though the Club is not an essential or integral part of the military mission of the Air Force.

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